BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF:

PARENT, individually; and S, a minor, individually, by and through his Parent and next friend, PARENT,
Petitioners,

v.

WILSON COUNTY BOARD OF EDUCATION,
Respondent.

No. 07.03-098656J
CLOSED HEARING

FINAL ORDER COVER SHEET

William Jay Reynolds
Administrative Judge

FOR THE PETITIONER:

Michael B. Schwegler, Esquire
5042 Thoroughbred Lane, Suite A
Brentwood, Tennessee 37027

FOR THE RESPONDENT:

Michael R. Jennings
326 North Cumberland Street
Lebanon, Tennessee 37087

For purposes of confidentiality, all references to the child/ student shall be to "S"; and references to the Local Education Agency shall be to "LEA." The Recipient should tear away and destroy this cover sheet to protect the identity of the participants and redact any references that might tend to reveal the names and identification of the minor.

FINAL ORDER
07.03-098656J

THIS CONTESTED MATTER came to be heard on the 5th and 6th day of November 2008 before William Jay Reynolds, Administrative Judge, sitting for the Commissioner of Education. Michael Schwegler, Esquire, from Brentwood, Tennessee, represented the minor petitioner (hereinafter "S"). Michael Jennings, Esquire, from Lebanon, Tennessee, represented the local education agency (hereinafter "LEA"). The hearing was held at the Board of Education Building in the Commissioners Conference Room.

The Subject of this hearing whether the LEA appropriately applied S's behavioral intervention plan (BIP) in March and April 2008.

ISSUES PRESENTED

1. **What special duties are owed by School Resource Officer David Bennett to S? What obligation did SRO Bennett have to be familiar with the Behavior Intervention Plan of S?**

2. **Was S arrested because he manifested his disabilities at school?**

3. **What is the responsibility of a SRO in his duty to maintain the public health, safety and welfare when it conflicts with, or is not covered by, the Behavior Intervention Plan?**

4. **Were the terms of S's February 1, 2008 IEP and BIP breached by the actions of SRO Bennett and/or Heath Springer?**

5. **Is the school system providing a free appropriate public education (FAPE) to S?**

   (a) Does S's placement with the LEA system, and

the program provided through his IEP, comply with the requirement that he be educated in the "least restrictive environment"?

(b) Does it comply with the requirement of "mainstreaming"?

6. Should S's IEP be reformed to include placement at Genesis Learning Academy?

PROPOSED FINDINGS OF FACT

1. S was born in 1993. Parent first met him in 1998, when he was five years old.

2. At the time Parent met S, he was living in a locked residential psychiatric setting for younger children.

3. At that time, he was diagnosed bi-polar, attachment disorder and PTSD. 4. PARENT officially adopted S on February 9, 2000.

5. In 2001, S and PARENT moved from Missouri to Georgia. In late 2005, they moved from Georgia to Tennessee.

6. In August, 2005, PARENT and S went to their home school in Wilson County, Tennessee.

7. PARENT had no complaints with the LEA complying with any statutory time requirements.

8. S was first placed at Middle School in a program called PAES. After about a month, he was transferred to an Elementary School within the system.

9. During the 2005-2006 school year, S had several behavior issues which prompted suspensions. None of those suspensions were over ten (10) days.

10. During the summer of 2006, S was hospitalized.

11. In August, 2006, after an IEP team meeting, it was determined that S would attend Genesis Learning Academy in Nashville, Tennessee.

12. S continued to have behavioral problems at Genesis Learning Academy and was suspended one (1) day for attacking another child.

13. In May, 2007, an IEP meeting was conducted. An IEP plan was developed dated May 29, 2007.

14. The PARENT did not agree with the terms of the May 29, 2007 IEP plan.

15. In the summer of 2007, S was hospitalized again at a Tennessee Mental Health Institute.

16. In August, 2007, S went to Youth Villages in Memphis, Tennessee.

17. On January 10, 2008, PARENT was advised by representatives of Youth Villages that they were "looking at discharge" for S

18. S was discharged from Youth Villages in March, 2008.

19. An IEP meeting was held on January 29, 2008 to begin school services.

20. An IEP and Behavior Intervention Plan were developed at the meeting on January 29, 2008.

21. S was released from Youth Villages on March 20, 2008. He began attending school at a Middle School in Wilson County, Tennessee on the following Monday, March 24, 2008.

22. When S came back to the LEA system on March 24, 2008, his teacher was Ms. Netrean Porter. There were two (2) aides to the class, Heath Springer and Ms. Ruby Lester. There were no more than nine (9) children in the class and Heath Springer thinks there were only six (6) students.

23. On Tuesday, March 25, 2008, S went with his class on a field trip to the Frist Center in Nashville, Tennessee. There were problems on the field trip.

24. On March 31, 2008, S had a psychiatrist appointment. When PARENT picked him up at school, she learned that an Incident Report had been filed regarding the problems at the Frist Center on March 25, 2008.

25. The PARENT requested an IEP meeting which was held on April 10, 2008.

26. On April 4, 2008, PARENT received a telephone call from Assistant Principal Adam Bannach advising that S had been disruptive at school that morning and had been transported to the Wilson County Jail.

27. At the IEP meeting on April 10, 2008, PARENT was angry and referred to the Wilson County Board of Education employees as "a bunch of mother f_____s."

28. At the April 10, 2008 IEP meeting, the PARENT asked for S to return to Genesis Learning Academy; that the LEA provides transportation to and from the Genesis Learning Academy; and that a one-on-one aide be provided to him at Genesis Learning Academy. The school system denied all three requests.

29. There are no regular education students at Genesis Learning Academy.

30. S returned to Middle School in April, after his two day suspension was served, to Netrean Porter's class where Heath Springer was an aide, and finished out the 2007-2008 school year at Middle School without any further incidents.

31. Heath Springer is an Education Assistant in a Behavior Modification classroom employed by the Wilson County Board of Education and has been since 2002.

32. Heath Springer provided summer services to S during the summer of 2008. He has a college degree in Physical Education.

33. During the 2008-2009 school year, S has attended High School where there has not been any incidents of physical aggression or anything that required an intervention.

34. The PARENT believes there are actions S could take that would justify a police officer having to take him into custody, such as: bringing a gun, knife, or drugs to school. She would expect the SRO (School Resource Officer) to enforce the full extent of the law towards S, just like any other student. SROs are important to the safety of a school environment.

35. There would be a set of facts that could exist that would justify a police officer, be it a School Resource Officer, or a police officer on the street, or a Metro officer called to the scene, that would justify them taking legal action and taking S into custody.

36. The Behavior Intervention Plan (BIP) developed as a part of the January 29, 2008 IEP was developed without information from Youth Villages, information which had been requested by the Wilson County Special Education Department, but never received, and the PARENT did not sign a written release to get that information.

37. The "Critical Anecdotals" were discipline records of S at Nicholas Hobbs Academy, the name of the school at Youth Villages, and were not available to the LEA system at the time the Behavior Intervention Plan was developed on January 29, 2008.

38. The Behavior Intervention Plan does not address what would happen if a student or staff member was in fear of safety of someone being harmed, be it another student, or staff member.

39. At the April 10, 2008 IEP meeting, Director of Special Education Jill Micco, and others with the Special Education Department, advised PARENT that they had only had S with them "a couple of weeks" and they had not had enough time to implement their program and to see if it could be successful.

40. The PARENT testified that S was "dramatically improved" from his treatment at Youth Villages.

41. Heath Springer has been a Teacher's Aide for two (2) years in the Behavior class at Middle School and was in his first year as the Teacher's Aide in the Behavior class at High School.

42. The LEA provided Heath Springer with specialized training prior to his working with S. Additionally, he was made aware of the accommodations necessary for S, and familiarized himself with S's IEP and his disabilities.

43. On March 25, 2008, while on a field trip to the Frist Center in Nashville, Tennessee, S tried several times to touch artworks. After he tried the first time, two staff members stayed on each side of him. When he tried, for the third time, to touch a piece of art, Heath Springer placed his hands on him and asked him to stop. At that time, S got upset, threw himself in the floor, started kicking, and kicked an innocent bystander that was walking by. Heath Springer tried at least five (5) times to get S to calm down and tried to "deescalate" him. When it did not work, he gently picked S up, put him over his shoulder and took him out of the art museum while S was spitting on him, punching him in the back and cursing.

44. When Heath Springer and S got outside the Frist Center, they sat down on a bench at which time S started destroying nearby shrubbery and plants. After using several verbal prompts to try to get S to "chill out", Heath Springer gently placed his hands on S, put him in a standing small child restraint and walked him to the school bus where they had a seat.

45. S became more agitated on the bus, head butted Heath Springer, breaking the skin and causing him to bleed, bit him several times, and spit in his face over twenty times.

46. Since the Frist Center incident on March 25, 2008, and after one other incident, S's behavior has been exemplary.

47. S's behavior has improved "by leaps and bounds".

48. Heath Springer asked School Resource Officer David Bennett what he needed to do with regard to documenting the Frist incident because he didn't want to press charges but he did want to make sure that he had documentation of what happened.

49. On April 4, 2008, when S arrived at school, he refused to leave the bus. The bus driver tried to help him up but S kicked the bus driver and kicked at him several times. Heath Springer gently picked S up and escorted him off the bus and walked him to his classroom.

50. After S got to the classroom, he ripped up his point sheet and flipped a desk over. The rest of the children in the classroom were removed so that S would not harm another student.

51. S would not comply with the instruction of Heath Springer's, or any of the other adults in the classroom. He spit in the floor, threw pencils and crayons, kicked and

flailed, hit Heath Springer a few times on the arm, kicked at Ms. Netrean Porter a few times and swung hitting her. It was then School Resource Officer David Bennett arrived.

52. Officer Bennett tried to get S to calm down. He had observed S striking Heath Springer and Netrean Porter and kicking Netrean Porter. Officer Bennett then decided that he needed to intervene. The whole incident lasted several minutes.

53. School Resource Officer Bennett, with Heath Springer assisting, placed S on the ground, while S was still fighting them, but they placed him down as gently as procedurally possible.

54. Heath Springer has been trained in, and is certified in, Therapeutic Crisis Intervention and the "Handle with Care" programs.

55. Heath Springer has never been told by the LEA that he needs to have someone arrested.

56. Heath Springer followed the Behavior Intervention Plan for S during the March 25, 2008 and April 4, 2008 incidents.

57. During school year 2008-2009 for S, Heath Springer is an aide at the High School. The teacher is Ms. Helen Daniels and there are two (2) other aides, Ms. Lauren Lassiter and Mr. Elvin Chandler. Heath Springer spends most of his time with S

58. S has improved since April 4, 2008: both in his educational and behavioral components.

59. It is essential for S to continue his interaction, as much as possible, with regular education students at High School; and that he learn to deal with different situations to prepare him for as much independence as is possible.

60. David Bennett was the School Resource Officer at Middle School during school year 2007-2008. He was employed by the Wilson County Sheriff's Department.

61. David Bennett had been employed by the Wilson County Sheriff's Department for over nine (9) years, having begun his employment November 1, 1999.

62. David Bennett started working as an SRO at Middle School in the fall of 2004.

63. The Principal exercises no direct control over the School Resource Officer.

64. David Bennett has received training through the post-certification as well as the National Association of School Resource Officers but has not had any specific training aimed at addressing behavior problems of Special Education students.

65. David Bennett first responded to a problem with S on April 4, 2008 when S was throwing crayons and had thrown a big bean bag. When he arrived at the scene, Ms. Porter and the aides were prompting S, trying to get S to calm down.

66. On the morning of April 4, 2008, as SRO Bennett left the gym, he headed to the 8th grade hallway where Coach Craig Engle hollered at him and said "I think they need your help in the behavior class".

67. SRO Bennett proceeded to the behavior class where he observed S being extremely upset and disorderly. He was throwing things, yelling and screaming. Ms. Porter and Heath Springer were prompting him, trying to get him to calm down, but he refused to calm down.

68. While refusing to calm down, S slung a book completely across the room as well as throwing whatever he could get his hands on. He then turned around and took a

swing and hit Coach Springer and kicked Ms. Porter. At that time, SRO Bennett placed S under arrest.

69. SRO Bennett felt that for the safety and security of S, and other students at school, the decision to take S into custody to get him away from the environment was the best decision under the circumstances.

70. SRO Bennett works for the Sheriff of Wilson County, Tennessee, not the school system, and it his responsibility, on the school grounds to which he is assigned, for whatever happens there. Nobody at the school "tells me who I can and cannot arrest".

71. After the April 4, 2008 incident, SRO Bennett has had no more problems with S.

72. Vicki Hulsey was a Special Education Program Coordinator for the LEA system. She has been employed by the Wilson County Board of Education for twenty-nine (29) years.

73. During that period of time, she has been a Special Education teacher and a speech language therapist. She has graduate degrees from Vanderbilt University.

74. S's disabilities include, but are not limited to, emotional disturbance and mental retardation. S has a full scale IQ of 47, according to the March 6, 2008 Psychological Assessment.

75. The provision of a one-on-one aide for S to be used exclusively at Genesis was not prohibitively expensive for the Wilson County Board of Education.

76. S's current educational program gives him mainstreaming, in the least restrictive environment, with access to general education peers.

77. No specific decision had been made by the LEA in regard to providing a one-on-one aide at the Genesis Learning Academy prior to the April, 2008 or May, 2008 IEP meetings.

78. In Vicki Hulsey's twenty-five (25) years as a Special Education teacher, she has not taught emotionally disturbed children. She was not present on March 25, 2008 and April 4, 2008.

79. On April 10, 2008, six (6) days after the act occurred, the manifestation determination was made at the IEP meeting.

80. Netrean Porter met S during the fall of 2005. When she first started teaching him, he was very excited, talkative, and worked in areas of behavior. Those areas included personal space, manners, and moving throughout the classroom without permission. Violent outbursts were a problem.

81. In 2005-2006, S never hurt or caused injury to himself or to other students.

82. Netrean Porter was in her twelfth year of teaching with a certification as a Special Education teacher. She was a graduate of Cumberland University with a double major in Education allowing her to teach K-8th grade students. She also has a Comprehensive Special Education degree that allows her to teach K-12th grade children from the spectrum of services that are involved with Special Education from mild to profound disabilities. Before teaching with the LEA system, she had prior experience with schools in Trousdale County, Tennessee and Charleston, South Carolina.

83. Netrean Porter worked with S, one-on-one, during the summer of 2007 extended school year. She had one (1) physical altercation with him at that time.

84. On March 25, 2008, while on the field trip to the Frist Center, S got very upset, trying to touch paintings and statues. Ms. Porter, and her aides, attempted to deescalate the situation consistent with the terms of the Behavior Intervention Plan.

85. Before the bus left the Frist Center, Heath Springer and Netrean Porter did deescalate S

86. After April 4, 2008, S's behavioral problems decreased significantly. There were not reports S hit or spit on anybody, staff or other students, or inappropriately touch anyone. He only had minor incidents.

87. Netrean Porter and Heath Springer complied with the Behavior Intervention Plan when dealing with S on April 4, 2008. S's behavior did escalate and go beyond the boundaries considered in the Behavior Intervention Plan. The interventions used in the April 4, 2008 incident did not work.

88. In Netrean Porter's classroom in March, April and May of 2008 there were eight (8) children and three (3) adults including: Heath Springer, Ruby Lester, and herself. The eight (8) children ranged in ages from 11 through 14.

89. Daily goal sheets are prepared by Netrean Porter for each student, including S. After S returned, from out-of-school suspension on April 7 and 8, 2008; and an absence on April 10, 2008, he met his goal every day from April 14 through April 25, 2008. During the month of May, his goals were increased from 60% to 70%.

90. After May 16, 2008, when S met his goals substantially, he had unexcused absences 8 out of the next 10 days.

91. S was present in the LEA system during school year 2007-2008 for forty-nine (49) days and was absent approximately 1/4 of that time.

92. Jill Micco was the Supervisor of Special Education for the LEA, having served in that capacity for five (5) years. She has worked for the LEA system for nineteen (19) years. She obtained a Master's Degree as an Educational Specialist as a School Psychologist and was subsequently employed by the Wilson County Board of Education as a School Psychologist in 1990.

93. S's actions on April 4, 2008 were a manifestation of his disabilities.

94. School Resource Officers are not ordinarily included as a person with a "need to know," as designed by the provisions of the IDEA, because of the confidential information related to each child.

95. The February 1, 2008 IEP and BIP did not distinguish between in-school interventions and initiating juvenile proceedings; the May 12, 2008 revision of the BIP, revised with the input of Martha Felker, of Beacon Behavioral Consultants, Inc., who prepared a functional assessment report dated April 23, 2008, likewise does not include any attempt at making the dichotomy.

96. Jill Micco, in her experience, had not seen an IEP that included such a definition or threshold.

97. The LEA had several behavior intervention classes in the County, at the elementary, middle school and high school. The LEA had a variety of services available to avoid contracting with private agencies, to wit they have no control.

98. The "least restrictive environment" is a requirement of the IDEA. A child is to be educated in the least restrictive environment preferably with their same age peers in their zoned home school in a public education.

99. The most restrictive environment is a private placement outside of the zoned school.

100. A Functional Assessment Report was prepared by Martha Felker of Beacon Behavioral Consultants, Inc. She was requested to provide assistance in developing S's education and behavior intervention plan. The report reveals the Behavior Intervention Plan was developed on January 29, 2008. It was based on observations made in mid-to-late 2007, a Parent interview, and documentation from previous placements. Prior to S's arrival at school, the Middle School was not authorized to receive behavior management information from the residential treatment program. The absence of information made it difficult for school personnel to develop an effective behavior intervention plan.

101. The Functional Assessment Report noted that the BIP recommended a placement in a behavior intervention classroom with the school making further modifications to the learning environment by adding a ground level room with a one-on-one staffing to be S's level plan. The room would double as a quad room when S needs a less stimulating environment to work on his assignments.

102. The Functional Assessment Report of Martha Felker makes eight "additional recommendations" for S's education. The LEA system is complying with each of these recommendations.

103. S's teachers this year at High School are Helen Daniels, in his Behavior Intervention class, and Terry Campbell is the teacher that does the other CDC class.

104. When the school system did send S to the Genesis Learning Academy, the school system first offered the Middle School services, but the PARENT wanted S placed at Genesis. The LEA knew S was fragile and they determined to work with him and to

try this until S could get stabilized. The plan was, when S became stabilized, he would be brought back to Wilson County to be educated at Middle School.

105. S's condition is different from that point.

106. No one from Genesis Learning Academy testified for the Petitioners that Genesis Learning Academy can provide a better program than Wilson County or that Wilson County's program is not appropriate for S.

107. Terry Campbell is a teacher in the LEA system and has been for three (3) years. She received her Special Education degree from Cumberland University.

108. Terry Campbell teaches at High School where she is one of S's teachers during school year 2008-2009. She has a comprehensive development classroom. Seven (7) students are on her caseload with ages that vary from 15 to 19 years. There are two (2) aides that assist her, Stephanie Patton and Rocky Gann; Heath Springer assists her from time to time.

109. Terry Campbell had S in her classroom from approximately 9:00 a.m. to 2:00 p.m. each day. She has never had any physical problems with S and he has not struck her.

110. Terry Campbell was satisfied that S was progressing toward his IEP goals for school year 2008-2009.

111. In Terry Campbell's classroom, S has interaction every day with regular education students in a class called "Nature and Needs". He interacts with peer tutors that come in during the four classes every day and they interact with model behavior and activities and help the students with their work.

112. Terry Campbell believed the program being provided for S was appropriate for him and recommended he continue on the LEA program.

113. Helen Daniels, during the first nine weeks of the 2008-2009 school year, had not observed S yelling obscenities at others, choking, hitting, pinching, scratching, biting, kicking, throwing items, slamming himself or other staff and doors, or pounding walls.

114. Helen Daniels was the behavior teacher at High School. This was the first year she had been in that position. She had taught for two (2) years. The other year she taught was at the Genesis Learning Academy in Nashville, Tennessee.

115. Helen Daniels had a Bachelors Degree in Therapeutic Recreation and was obtaining her Masters Degree in Special Education.

116. In Ms. Daniels behavior classroom, she had nine (9) students and three (3) aides: Heath Springer, Elvin Chandler and Lauren Lassiter. The students range in age from 14 to 20, both male and female.

117. Her classroom, as well as that of Terry Campbell's, was age appropriate for S.

118. Helen Daniels first met S at the "Empower Me" Day Camp two years ago. In her class, S had made progress.

119. As opposed to two years ago, S's social skills were developing well and he talked appropriately.

120. S was doing wonderful in her class this year. She had not had any big incidents with him and has had no incidents of aggression. There were no major problems with S

121. While she has three (3) aides in her classroom, Heath Springer spends most of his time with S.

122. Helen Daniels has had training in both Therapeutic Crisis Intervention and "Handle with Care."

123. Genesis Learning Academy uses the "Handle with Care" program which involves two hours of training the first time; and three hours the second time.

124. While teaching at the Genesis Learning Academy during the 2007-2008 school year, Helen Daniels personally observed the Metropolitan Nashville Police Department being called to Genesis Learning Academy on three (3) specific times, two of which were for her class.

125. One of those incidents at Genesis Learning Academy involved a male student punching Ms. Daniels' assistant in the face.

126. The programs being provided at Wilson Central High School for S were appropriate.

127. S was responding favorably in the Wilson County program and progressing.

128. Helen Daniels had seen S slam doors but had not seen S yelling obscenities at others, choke, hit, pinch, scratch self and others, bite, kick, throwing objects or pound walls. She had never seen S push an aide or other students.

129. Students eligible for services at Genesis Learning Academy, for the most part, were students who had emotional or behavioral issues that prohibited them from being successful in a less restrictive setting, e.g. a public school resource room or regular education classroom.

130. Genesis Learning Academy did not have a law enforcement officer, or SRO, on site but, if needed, they would call the Metro Nashville Police Department. Examples of calls were because illegal contraband had been found in a student's possession and a student had deliberately assaulted or hit another student.

131. That could happen two or three times per year at Genesis Learning Academy. The police would be called to deal with a specific incident which has escalated above and beyond the child's behavior intervention plan.

132. A one-on-one individual hired specifically to work with a student at Genesis Learning Academy is more the exception than the rule.

CONCLUSIONS OF LAW

The Court considered the following legal authorities and precedents in making a determination in this cause:

The United States Supreme Court has recently reaffirmed that the "burden of proof, in an administrative hearing challenging an IEP, is properly placed upon the party seeking relief". Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005). A party challenging an IEP or compliance with the IDEA has the burden of proving by a preponderance of the evidence that the IEP devised by the school district is inappropriate or is otherwise non-compliant. *Kings Local Sch. Dist. Bd. of Educ. v. Zelzany*, 325 F.3d 724, 729 (6th Cir. 2003); *Burilovich ex rel. Burilovich v. Bd. of Educ. of the Lincoln Consol. Schs.*, 208 F.3d 560, 567 (6th Cir. 2000); *Dong ex rel. Dong v. Bd. of Educ. of the Rochester Community Schs.*, 197 F.3d 793, 799 (6th Cir. 1999); *Johnson v. Metro*

Davidson County Sch. Syst., 108 F.Supp.2d 906, 914 (M.D. Tenn. 2000). Thus the burden of proof at all times in this matter remained on the Petitioners.

Assessing a school district's liability under the IDEA involves a two-pronged procedural/substantive inquiry: First, whether the school district complied with the procedures set forth in the IDEA? *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 206 (1982); *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir. 2003); *Burilovich*, 208 F.3d at 565. When considering procedural matters, a reviewing authority "should 'strictly review technical deviations for procedural compliance.'" *Johnson*, 108 F.Supp.2d at 913 (quoting *Burilovich*, 208 F.3d at 565).

Second, has the school district fulfilled its duty to provide the special education student with a FAPE? *Rowley*, 458 U.S. at 206-07; *McLaughlin*, 320 F.3d at 669; *Burilovich*, 208 F.3d at 565. If a school district violates a procedural requirement under the first inquiry, the violation must nonetheless result in substantive harm—and thus constitute denial of a FAPE—under the second prong for liability to attach. *Rowley*, 458 U.S. at 208; *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 854, 859 (6th Cir. 2005) (citing *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001), *reh'g en banc denied*, April 5, 2005); *see Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992) (procedural violations that deprive an eligible student of an individualized education program or result in the loss of educational opportunity constitute a denial of FAPE). When the sufficiency of or compliance with the terms of an IEP do not implicate procedural violations, reviewing authorities advance directly to the second, substantive inquiry. *Johnson*, 208 S.Supp.2d at 913.

1. What special duties are owed by School Resource Officer David Bennett to S? What obligation did SRO Bennett have to be familiar with the Behavioral Intervention Plan of S?

Wilson County Sheriff's Deputy David Bennett was the School Resource Officer serving at the Middle School during the events of March 25, 2008 and April 4, 2008. *Tennessee Code Annotated,* § 49-6-4202 (6) defines a School Resource Officer as a "law enforcement officer, as defined under Section 39-11-106, who is in compliance with all laws, rules and regulations of the Peace Officers Standards and Training Commission and who has been assigned to a school in accordance with a Memorandum of Understanding between the Chief of the appropriate law enforcement agency and the LEA".

Deputy Bennett testified that he was assigned to the Middle School pursuant to an agreement between the LEA system and the Wilson County Sheriff's Department. He further testified that he was "post-certified" and in compliance with all laws, rules and regulations of that organization.

"Law enforcement officer" is defined at *Tennessee Code Annotated,* § 39-11-106 (21) as "an officer, employee or agent of government who has a duty imposed by law to: (A) maintain public order; or (B) make arrests for offenses, whether that duty extends to all offenses or limited to specific offenses; and (C) investigate the commission or suspected commission of offenses.

The definition of "law enforcement officer" clearly states that the officer has a "duty imposed by law". One of his duties is to "maintain public order" and it does not differentiate between regular education students or special education students. Likewise, the definition of "School Resource Officer" makes no differentiation between the two.

Clearly, the "law enforcement officer" and by definition, a "School Resource Officer" has a duty, not discretion, to enforce the law. If the SRO has been appropriately placed at the school by an appropriate Memorandum of Understanding as defined in *Tennessee Code Annotated,* §38-8-120, and has met the employment standards for School Resource Officers as defined in *Tennessee Code Annotated,* §49-6-4217, he may enter upon his duties, which include to "maintain public order", "make arrests for offenses", and "investigate the commission or suspected commission of offenses".

Tennessee law does not seem to impose any special duties upon School Resource Officers dealing with special education students.

On May 28, 2008, Governor Bredesen signed into law Public Chapter No. 1063 titled "Special Education Isolation and Restraint Modernization and Positive Behavioral Supports Act". This act is codified at *Tennessee Code Annotated,* §49-10-1301, et seq. Except for the provisions which require the promulgation of rules and regulations, the act shall become effective January 1, 2009. Therefore, the act was not in place, and could not be applicable to, the events of March 25 and April 4, 2008.

This act defines "school personnel" as an individual employed on a full time or part time basis by a public school. David Bennett was not "school personnel" in his capacity as a SRO, as he was employed at all times by the Wilson County Sheriff's Department, acting under the supervision of Wilson County Sheriff Terry Ashe. He was assigned to West Wilson Middle School by the Wilson County Sheriff's Department.

Public Chapter No. 1063, at *Tennessee Code Annotated,* §49-10-1304 (b) (3) (C) codifies what appears to have been the law at all times prior to the adoption of this act:

"A School Resource Officer (SRO) may, upon witnessing an

> offense, take the student into custody; however, this option is available only if the SRO was a Deputy Sheriff or police officer fully compensated by a law enforcement agency and not a school official."

This law does not change the existing law. However, it does attempt to provide more specific instruction, and speak to an issue upon which the law is silent, by giving "school personnel" direction about when they may report a suspected crime and when they may file a juvenile petition.

Tennessee Code Annotated, § 49-10-1304(b) (3) (A) gives school personnel the right to report a suspected crime by calling a law enforcement official and at part (B) states school personnel "may file a juvenile petition against a student receiving special education, only after conducting a manifestation determination that results in a determination that the behavior that resulted in the act requiring disciplinary action was not caused by the student's disability".

This portion of the law, which was not effective until January 1, 2009, attempted to clarify the school personnel's options with regard to reporting a suspected crime or filing a juvenile petition. There was no such law in effect on March 25 or April 4 of 2008 and the actions of Special Education Assistant Heath Springer violated no State or Federal law. In fact, portions of that law, only confirm what is contained at *Tennessee Code Annotated*, § 49-6-4301(a) which provides that "every teacher observing or otherwise having knowledge of an assault or battery or vandalism endangering life, health or safety committed by a student on school property shall report such action immediately to the principal of such school". It goes on to require the principal to report

this information to the municipal or Metropolitan Police Department or Sheriff's Department having jurisdiction.

The action taken by SRO Bennett to advise Heath Springer of his right to take a charge, or fill out a report, was consistent with State law. That is, Heath Springer did what was legally authorized.

Finally, nothing in the IDEA, or the subsequent regulations, prohibits reporting a crime or law enforcement exercising their responsibilities. In fact, at 34 CFR § 300.535(a), we find the following:

> "Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities, or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State laws to crimes committed by a child with a disability".

If a student with a disability commits a crime, a school district may be permitted to summon law enforcement authorities without providing procedural safeguards. Section 615(k) (6) of the 2004 *Individuals with Disabilities Education Act* (IDEA) states:

> "Nothing in (part B) shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities".

This is consistent with the holding of the hearing officer in *Northside Independent School District*, 28 IDELR 1118 (SEA TX 1998). In that case, a sixteen year old student with a learning disability, an emotional disturbance and other health impairment, cut

another student with a knife during a confrontation after school on or near the campus in the bus area. School officials called the law enforcement authorities and the student was detained by juvenile authorities. He was held in detention from October 29, 1997 to November 19, 1997.

The hearing officer concluded that:

> "IDEA does not curtail the authority of law enforcement authorities to arrest and detain a child determined to have committed a crime. IDEA does not prohibit a public school district from reporting a crime committed by a child with disabilities to law enforcement authorities. 20 U.S.C. 1415 (k)(9)(A) It is not necessary for school officials to comply with IDEA's procedural safeguards, including notice and ARD Committee deliberation, before reporting criminal activity committed by a student with a disability. This is so regardless of the child's eligibility classification and regardless of whether the school discipline options were modified in the child's IEP. Making a report that leads to the child's detention by juvenile authorities does not constitute a cessation of services, in the nature of an expulsion, because IDEA requires States to provide appropriate Special Education to all eligible children regardless of their location, including children in State custody. 20 U.S.C. 1412"

2. Was S arrested because he manifested his disabilities at school?

The proof showed S was arrested by SRO David Bennett on April 4, 2008, after all attempts had been made to comply with the Behavior Intervention Plan. With all interventions tried, S continued to assault his teacher, Netrean Porter, and Educational Assistant, Heath Springer. After exhausting all other remedies available, SRO Bennett

performed his duties as required by law. As it has been previously shown, manifestation of a special education student's disabilities by acts of violence on a teacher, another staff member, or student does not relieve a law enforcement officer from the responsibility of taking the action necessary to limit a situation, including effecting an arrest and filing a juvenile petition.

Likewise, the actions of Heath Springer were not procedural and/or substantive violations of the IDEA. Heath Springer testified, and David Bennett confirmed, that he was advised by SRO Bennett of his right to file a report in this matter. Heath Springer stressed the need for "documentation". The subsequent action of Heath Springer to take an additional juvenile petition against S was only done after SRO David Bennett lawfully performed his duty. Had the second violent incident not occurred, Heath Springer would not have taken his juvenile petition. While Public Chapter No. 1063, to be effective January 1, 2009, will limit the right of school personnel such as Heath Springer to file a juvenile petition, no such limitation was in place at the time SRO Bennett lawfully performed his duty.

3. **What is the responsibility of a SRO in his duty to maintain the public health, safety and welfare when it conflicts with, or is not covered by, the Behavior Intervention Plan?**

When a crisis situation occurs, such has happened here on both March 25, 2008 at the Frist Center, and April 4, 2008, in the classroom, every effort should be made to comply with the Behavior Intervention Plan. Clearly, from the testimony presented, every effort was made to comply. The Behavior Intervention Plan in place on March 25, 2008, allowed for "physical interventions when a danger to self/others".

Likewise, on April 4, 2008, Netrean Porter and Heath Springer attempted to comply with the Behavior Intervention Plan but, when unsuccessful, SRO Bennett performed his lawful duty. Interestingly, the Behavior Intervention Plan does not address what should happen when physical interventions by the staff are unsuccessful in resolving a crisis situation.

In Orange County (FL) School District, 101 LRP 1151, the Office of Civil Rights for the Southern Division in Atlanta responded on January 1, 2000 to a complaint alleging that the school district was failing to provide students in the severely emotionally disabled (SED) program a free appropriate public education because it was criminally prosecuting them for behaviors that are a manifestation of their disability.

The Office of Civil Rights, in their ruling, found the district officials stated that the teachers are attempting every intervention they can until a student's behavior escalates to the point of becoming dangerous, threatening or completely out of hand. They utilize behavior specialists, the time management center, calling Parents, etc. The SRO is then called when the student's behavior is criminal and cannot be controlled by the district staff.

The OCR found that the Orange County District had 13 SED students arrested on campus for committing what is listed in the code as a crime such as "battery on a school official/employee". The letter concludes that:

> "Based upon the above factual findings, OCR has determined that the evidence is insufficient to indicate that the District is failing to provide SED students an appropriate education by having them criminally prosecuted".

No one can argue that a Behavior Intervention Plan can be designed to cover every conceivable set of facts. Neither can anyone dispute that there are certain instances when the intervention of, and action by, law enforcement officials is appropriate. The Parent testified that there would be specific instances where law enforcement action would be appropriate, both for the safety of teachers and staff, and for her child as a student.

In a crisis situation, every effort must be made to comply with the Behavior Intervention Plan. When the plan does not address the specific facts presented in the crisis situation, and the actions contained in the plan are not successful, then law enforcement must have the right to, and has a duty to, enforce the law.

In *Chester Upland(PA) School District*, 24 IDELR 79, an Office of Civil Rights decision from the Eastern Division of Philadelphia, Pennsylvania dated November 9, 1995, the OCR was presented with a set of facts in which a student was involved in a verbal and physical altercation with another student in the shop area at the school. As a result of the fight, both students involved suffered "bloody" lips. The allegation before the OCR was that the District mistreated the student in its enforcement of disciplinary procedures by failing to implement a behavior management component contained in his Individualized Education Program (IEP).

In concluding that the evidence did not show that the student was discriminated against on the basis of disability, the OCR finds:

> "That the actions by school officials in contacting local police did not violate the Section 504 or ADA regulations. Moreover, this action did not violate the letter or spirit of the student's IEP or any behavior

management component to his educational placement in light of the violence and danger in the situation. School officials have a clear and unconditional duty to protect the health and safety of its students and employees and OCR will not disturb that responsibility absent overwhelming and significant evidence of dereliction of duty or subterfuge. Such evidence does not appear in this case."

4. Were the terms of S's February 1, 2008 IEP and BIP breached by the actions of SRO Bennett and/or Heath Springer?

The BIP included as a part of the February 1, 2008 IEP did not address procedure and protocol encompassing the severity of the situations presented on March 25, 2008 to Heath Springer and Netrean Porter; then again, on April 4, 2008 to SRO Bennett, Ms. Porter and Mr. Springer.

The actions taken by those individuals were not in "non-compliance" with the BIP; rather, they were the most reasonable actions that could be taken under the circumstances consistent with the intent of the BIP (on March 25, 2008 incident) and with State law and the duty placed upon SRO Bennett (on April 4, 2008).

5. Is the school system providing a free appropriate public education (FAPE) to S?

In the leading case of *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 553 IDELR 656 (1982), the Court determined that the State has a requirement under the EHA, now IDEA, to provide a handicapped child with a "free appropriate public education" (FAPE). The Court went on to hold that the school district would satisfy this requirement "by providing personalized instruction with

sufficient support services to permit the child to benefit educationally from that instruction".

States are not required, under IDEA, to "maximize" the potential of disabled students. *Daugherty v. Hamilton County Schools,* 21 F.Supp.2d 765 (E. D. TN 1998) The U.S. District Court in the *Daugherty* case reaffirms that the "IDEA provides a basic floor of opportunity, consisting of access to specialized institutions and related services individually designed to provided educational benefit to a disabled student, and the standard is satisfied by personalized instruction with sufficient support services to permit the student to benefit educationally therefrom".

The Parent bears the burden of proving by preponderance of the evidence that the IEP devised by the LEA system is inappropriate under the IDEA. See *McLaughlin v. Holt Public Schools Board of Education,* 320 F.3d 663 (6th Cir. 2003).

The Parent did not carry the burden of proof to show the LEA was not providing a free appropriate public education. The only proof put forward by Parent was a preference for Genesis Learning Academy because of the fear the LEA will again bring charges against S by juvenile petition; and the risk of being so charged at Genesis Learning Academy in Nashville, Tennessee was much less. Neither is correct. Since April 4, 2008, the proof has shown that S has been an exemplary student. While Parent did not produce any proof to support her assertion that Genesis Learning Academy is better for S, the deposition of Terry Adams, Executive Director of Genesis Learning Academy, clearly shows that the Metropolitan Police Department was called to the school two or three times a year to deal with assaults or illegal contraband. He testified that, if a child

had struck another child or had an altercation unprovoked, that a juvenile petition would be filed, depending on the case.

The Parent presented no proof to dispute the IEP of S does not provide an educational benefit to her son. The testimony of Netrean Porter, from her limited time with S from March 24, 2008 to the end of school; the testimony of Heath Springer, as an aide from March 24, 2008 to the end of the 2008 school year, the extended school summer services that he provided and the services as an aide to S at High School during the current school year; the testimony of Educational Specialist Vicki Hulsey, Special Education Director Jill Micco and current teachers Helen Daniels and Terry Campbell; all show that S is: receiving an educational benefit and is reaching, or within reach, of his educational goals described in the IEP, is being served in an age appropriate classroom, and is being served in a small classroom of six to nine students with a teacher and three aides.

The Parent attempted to show a procedural violation of S's IEP. Both Jill Micco and Vicki Hulsey testified the decision was made in the IEP meeting, with input from Parent. They did discuss options outside the meeting, and this is not prohibited as shown in the case of *N.L. v. Knox County Schools*, 38 IDELR 62 (6th Cir. 2003). There, the 6th Circuit Court found no harm to the Parent resulting from the discussion between the various district experts concerning the child's assessment report. The Court there, as occurred here, found the mother took an active role in the IEP meeting. The Court found that evaluators may prepare reports and come to the meeting with opinions regarding the best course of action for the child, "as long as they are willing to listen to the Parents and the Parents have the opportunity to make objections and suggestions". The holding in

this Knox County Schools case is on point with the set of facts presented to this hearing officer. The Parent did have input into the preparation of each of the IEPs for S. Wilson County Special Education personnel committed no procedural violation. That is to say, if there were a procedural violation then there was no harm to either the Parent or student.

(a) Does S's placement with the LEA system, and the program provided through his IEP, comply with the requirement that he be educated in the "least restrictive environment"?

(b) Does it comply with the requirement of "mainstreaming"?

These issues will be considered together, as it is difficult to address one without the other.

The IDEA mandates educational services are to be provided to students with disabilities in the least restrictive environment under the circumstances. 34 CFR §300.552(d)

And, as the Court notes in the *McLaughlin* case, 220 F.3d 663 (6th Cir. 2003), the requirement that the school system provide a disabled child with the least restrictive environment is a mandate favoring mainstreaming, that is, the education of disabled children alongside non-disabled children to the maximum extent appropriate for the individual child.

From the proof presented, from both sides, the educational program being provided to S by the LEA met the requirements of the IDEA that: 1) to the maximum extent appropriate, the disabled child was educated with children who were not disabled; and 2) S was educated in the least restrictive environment. Helen Daniels and Terry

Campbell testified about the regular education students who come into their classroom to assist special education students. This interaction brings together the able and non disabled to mutually learn one about the other. They testified about the progress being made by S and his relationship with the regular education students. Coach Heath Springer testified about S's advancement in his social skills through his relationships with regular education students. Helen Daniels, who taught at Genesis Learning Academy before teaching with the LEA, testified the "peer tutoring" at Genesis Learning Academy consisted of children coming out of other special needs classrooms to tutor the CDC class with the "fragile kids." The description did not appear to be any more appropriate than that offered by the LEA..

6. Should S's IEP be reformed to include placement at Genesis Learning Academy?

From the proof presented, S was making educational progress under his IEP and placement at High School as a 9th grade student in the classes of Terry Campbell and Helen Daniels. He was placed in the "least restrictive environment" and mainstreamed, as much as possible, with regular education students, both in the educational setting, and in his social skills. He was in an age appropriate classroom, with a smaller student: teacher ratio than offered at the Genesis Learning Academy.

There was no proof Genesis Learning Academy would provide a better program than the LEA. It was very clear the Parent wanted S to attend Genesis Learning Academy because she fears S will be arrested again at the behest of the LEA. This is a viable concern, however, it is futile for this tribunal to place a limitation, by Order, to limit a legal right in the maintenance of discipline. There was no persuasive proof

provided that a program at Genesis Learning Academy would be either appropriate or in the best interest of S. At one time, by agreement of the parties, placement for a closed period at the Genesis Learning Academy was appropriate. However, the proof showed S was responding favorably and was progressing in the program at High School. Controls should remain in place wherein S is not a threat of harm to himself or others.

CONCLUSION

Based upon the entire record and the foregoing, it is concluded the Petitioner has failed to carry the burden of proof; and this administrative judge finds in favor of the LEA on the issues presented; and declares the LEA as the prevailing party. Further, it is concluded the LEA shall continue to provide the services of a fully trained aide to assist S in all aspects of his school day, both academic and behavioral; and the LEA shall immediately perform a Functional Behavioral Assessment (FBA) regarding S. The parties are herein ordered to cooperate, release and furnish all documentation, pertinent to S, which would conceivably assist in the preparation of the FBA. After the evaluation is complete, the IEP team should convene and modify, adjust, and develop an appropriate and suitable IEP for S. The IEP should include the BIP. The team should anticipate and develop a BIP which encourages implementations of interventions short of police reports and arrest.

DECISION

In consideration of the foregoing, the Administrative Judge now issues the following Orders:

1. The Parent's request for placement of S at the Genesis Learning Academy is denied.

2. The LEA shall arrange and pay for a Functional Behavioral Assessment to address the problem behaviors of S.

3. On receipt of the assessment, the IEP team shall convene to complete a suitable and appropriate IEP for S.

4. The LEA is determined to be the prevailing party.

All other Motions, Petitions, or requests not specifically addressed herein are hereby deemed denied.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED, AND DECREED.

ORDERED AND ENTERED this 1st day of May 2009.

WILLIAM JAY REYNOLDS
ADMINISTRATIVE JUDGE

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.